



Department of Law Monthly Report

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Collections & Support

Unit Collects \$130,000 in Restitution for Victims

In December, the Collections Unit opened 113 criminal and 21 juvenile restitution cases for collection. Initial notices were sent to 125 recipients. Sixty-four judgments were paid in full, and satisfactions of judgment were filed. Our office received payments totaling \$67,245.34 toward criminal restitution judgments and payments totaling \$63,303.16 toward juvenile restitution judgments this month. We requested 434 disbursement checks, and issued 224 checks to recipients.

In other matters, three civil collection cases were closed and one lien was discharged. Five demand letters were sent to debtors in OSHA matters. On the criminal side, the Unit sent 34 letters responding to inquiries from defendants and courts regarding payment agreements and other collection issues.

Two Complex CSED Cases Resolved

AAG Susan Daniels, who is assigned to handle the child support caseload in Southeast Alaska, saw the resolution of two complex and lengthy cases in December.

In *Keating v. Traynor*, the issue was whether the Child Support Enforcement Division was liable for collecting too much money from the child support obligor. The case was complicated by the fact that CSED was not responsible for disbursing the support that it collected from the obligor. Instead, CSED sent the support funds to the California child support agency, which had requested CSED's assistance in collecting from the obligor who lived in Alaska. Ultimately, the court determined that CSED was not liable for the overpayment because it had simply passed the funds on to the California agency.

AAG Daniels also obtained a favorable ruling from the Ketchikan superior court in a case involving an injured child support obligor who received a lump sum settlement in an unrelated personal injury case. Based on the obligor's poor payment history, the court held that CSED could impose a trust on the personal injury settlement proceeds for the payment of future child support.

Favorable Outcome in CSED Drivers License Action

AAG Leroy Latta obtained a favorable outcome in a superior court action challenging CSED's decision to suspend child support obligor Junor Douglas's driver's license for failure to pay child support. Critical to that outcome was Mr. Latta's discovery that Mr. Douglas was on federal probation. Mr. Latta contacted the federal probation officer and obtained the officer's assistance in getting Mr. Douglas's last two years of federal probation income reporting forms released for use as evidence. Those reports showed that Mr. Douglas had a steady, unreported cash income that justified a reasonable payment agreement in CSED's action. The evidence was persuasive enough that the superior court judge persuaded Mr. Douglas to enter into a payment agreement for more than the minimum amount CSED would have accepted.

Court Denies Obligor's Request For Relief From Order

In the James Jones case, the superior court denied a child support obligor's motion to set aside a child support order under Civil Rule 60(b)(6). In January 2000, the Palmer superior court had ordered Mr. Jones to pay \$540 per month to support his two children. Mr. Jones was incarcerated from February 2001 through March 2003. In November 2001, Mr. Jones asked CSED to review the support order, but he failed to submit the necessary income information. As a result, CSED denied the request. Mr. Jones did not appeal that decision. Nearly two years later, in November 2003, Mr. Jones asked the court to set aside the January 2000 order for the period during which he was incarcerated and to order him to pay only \$50 per month for that period. Mr. Jones argued that CSED had acted improperly and had assured him that the modification would be taken care of. This misconduct, he claimed, was grounds for relief under Civil Rule 60(b)(6).

AAG Diane Wendlandt opposed that motion to the extent that Mr. Jones based his claim on alleged misconduct by CSED. As the evidence demonstrated, CSED had acted properly in its response to Mr. Jones's request for modification. The superior court agreed with the state's analysis, finding that "CSED behaved properly and that Mr. Jones failed to take the necessary steps to obtain relief from CSED." Therefore, the court denied the motion for relief under Civil Rule 60(b).

Commercial & Fair Business

Regulations Completed for Regulatory Commission of Alaska

In December AAG Virginia Rusch worked with the Regulations Attorney (Steve Weaver) to complete review of the RCA's regulations that deal with fuel cost adjustment clauses for

electric and gas utilities. Fuel cost adjustment charges are one component of gas and electric utility customer billings, and are designed to cover fuel costs that may vary much more rapidly than other, more predictable costs such as salaries and wages of employees. These new regulations set criteria for the costs that are allowed to be included in the fuel cost adjustment charges, set out a formula for calculation of the charges, and spell out the RCA's filing procedures and requirements to approval of changes in fuel cost adjustment charges.

AAG Rusch also completed agency attorney review of the RCA's ex parte regulation, and assisted the RCA in developing regulations regarding regulatory requirements for small water and sewer utilities.

Two Court Decisions on Appeals Result In Remands to RCA

On December 8, the superior court (Judge Torrisi) granted the RCA's motion to dismiss Alaska Communications Systems' (ACS') appeal of an RCA order that required ACS to follow its line extension tariff in providing new facilities to customers of General Communication, Inc. (GCI). ACS had argued that the RCA's action was preempted by an order of the Federal Communications Commission known as the Triennial Review Order, which was issued after the RCA's order on appeal. The court agreed with the RCA that the matter should be returned to the RCA to consider the impact of the FCC order. After the remand, ACS and GCI jointly asked the RCA to vacate the part of the RCA's order that ACS objected to. The RCA granted the motion because ACS and GCI agreed that there is no present controversy between them over this issue.

On December 12, the Alaska Supreme Court remanded ACS' "rural exemption" appeal to the RCA. Under the Telecommunications Act

of 1996, telephone utilities that were previously monopoly service providers must lease their facilities to companies that now want to compete to provide telecommunications services. However, the Telecom Act also provided a "rural exemption" that applied to most of Alaska other than Anchorage. The rural exemption can be terminated if the state utilities commission finds that certain criteria are met.

The issue in this appeal was which utility had the burden of proof on GCI's request to terminate ACS' rural exemption in the Juneau and Fairbanks areas. The APUC (predecessor to the RCA) first put the burden on GCI, and that decision was reversed by a superior court. The APUC and the RCA in consecutive hearings then followed the court order and put the burden on ACS. Meanwhile, the 8th Circuit reversed an order of the FCC on the same subject, and ACS argued that this decision controlled this case. The Alaska Supreme Court agreed and remanded to the RCA to reexamine the issue, placing the burden of proof on GCI.

Division Overcomes Challenge To Cease and Desist Orders

On December 10-11, 2003, the Division of Occupational Licensing (Division) settled with two Anchorage unlicensed body piercers, who had both requested administrative hearings to challenge the cease and desist orders which the Division had issued against each of them in August 2003. Under the terms of the settlement, the body piercers agreed to withdraw their requests for hearing and to abide by the terms of the cease and desist orders, which prohibit their practice as body piercers because they are not licensed as such and because the shop they practiced in is not licensed for body piercing, as required by AS 08.13.070(1)-(2). AAG Robert Auth represented the Division in these proceedings and in the settlement negotiations.

Banking & Securities Reaches Settlement With Edward Jones & Co.

A settlement was finalized and payment of \$11,000 received in the administrative adjudication of the Division of Banking, Securities, and Corporations against Edward Jones & Co. and its agent Peter Van Flein. Hearing Officer Joseph Miller had found that respondents had misclassified a customer complaint letter relating to the handling of an investment account. In addition to the monetary settlement, respondents agreed to conduct a review of all incoming customer correspondence at all Edward Jones offices in Alaska for the preceding three years, report to the division regarding complaints received, and conduct certain training of its Alaska agents regarding complaint identification and record keeping. AAG LuAnn Weyhrauch represented the Division in these proceedings and in settlement negotiations.

Environmental

ADEC Drinking Water Regulations

AAG Mary Lundquist assisted the Department of Environmental Conservation in promulgating new drinking water regulations dealing with lead and copper requirements. The changes are being made to comply with Federal Drinking Water regulations and will allow the state to retain primacy enforcement responsibility for the safe drinking water program.

Human Services

Supreme Court Decides Barrow CINA Appeal

The Alaska Supreme Court issued an unpublished Memorandum Opinion and

Judgement in *Mary E. v. State, DHSS, #S-10705* (12/17/2003). In this termination of parental rights case the mother, who lived in Barrow, was required by medical conditions to travel to Anchorage during part of the termination trial. The judge denied her motion to continue the trial, but instead required her to participate by telephone. The supreme court held that this arrangement did not violate her constitutional rights because she was able to participate for the entire trial, she was able to testify in person so that the judge could evaluate her credibility to factual issues, and she did not demonstrate any harm from having to participate in the remainder of the trial by telephone.

The supreme court affirmed the trial court's termination of the mother's parental rights, holding that in spite of the mother's improvement in many areas, her continued involvement with, and exposure of the children to, a domestic violence offender meant that she had not remedied the conduct or conditions that placed her children in danger.

Finally, the court approved the superior court's reliance on evidence presented to the court after the termination trial had been completed but before the court had issued its decision. Based upon statements made in the village's written closing argument filed after the trial, the court ordered the Office of Children's Services to investigate and report. The agency's report indicated that the mother was continuing to expose the children to her abusive partner. The supreme court found no error in the trial court's reliance on the post-trial evidence, as long as the parties had been given a chance to respond to the court's intent to consider the evidence. AAG Alicia Porter represented the state.

Labor & State Affairs

State Prevails in Employment Case

The jury returned a verdict in favor of the state in the case of George Romero versus the State of Alaska, Department of Corrections and 13-individually named defendants. The plaintiff claimed he was improperly terminated from employment as a correctional officer at the Spring Creek Correctional Center, alleging that he was fired because he was a "whistleblower," and that the state had violated the implied covenant of good faith and fair dealing in terminating his employment. The plaintiff sought over \$500,000 in damages, and sought punitive damages against the individually named defendants. The state defended the termination, presenting 20 witnesses and hundreds of pages of documentation in support of the termination of plaintiff's employment for good cause. At the conclusion of the plaintiff's case, the state moved for a directed verdict, and the judge granted a directed verdict regarding the plaintiff's claims against the individually named defendants. The judge allowed the plaintiff's claims against the state to go to the jury for deliberation.

The trial was held in superior court in Anchorage before Judge Tan and lasted 10 days. The jury's verdict was returned first thing in the morning on the eleventh day. This case was handled by AAG Sarah Felix, with much assistance from litigation coordinator Terri Begley-Allen.

Supreme Court Affirms State's Denial of Bid Protest

In a Memorandum Opinion and Judgment, dated December 17, 2003, the Alaska Supreme Court affirmed the state's denial of a bid protest filed by AMAT regarding the award

of a lease for the AOGCC space to another offeror, K2B Partnership. *AMAT v. State of Alaska, Dept. of Administration*, Case No. S-10637 MO&J.

AMAT raised five points on appeal. The most relevant issue concerned whether an offer is invalid if the offeror lacks an enforceable legal interest in the premises offered to be leased. The court affirmed the commissioner's determination that, absent an express requirement in a solicitation that an offeror must have an ownership interest in or other legally enforceable right to the property offered, the nature of an offeror's interest in the property is a question of responsibility to be determined by the contracting officer. Which means, the contracting officer need only obtain adequate assurances that the offeror would be able to perform at the time it was called upon to do so if awarded the lease. If the offeror did not perform, then the state would be entitled to damages incurred based upon the nonperformance of the winning offeror.

Other points on appeal (which were affirmed in favor of the state) included (1) whether the department may use clarifying information obtained under 2 AAC 12.285 to disqualify an offer as non-responsive or an offeror as non-responsive, (2) whether the department unfairly treated AMAT differently than other offerors, and (3) whether the department improperly denied AMAT a hearing on its protest.

Legislation & Regulations

Legislature Convenes January 12; Department Increases Efforts to Finalize the 2004 Governor's Bill Package

During December, 2003, the Legislation and Regulations Section, in coordination with many assistant attorneys general in the Department of Law, worked on finalizing the 2004 bill

package for the governor's consideration. The topics are varied and required expertise from many different areas of law. Thanks to all assistant attorneys general for their hard work this month.

The Legislation and Regulations Section also finalized the legal reviews and approved for filing regulations packages as follows: (1) Department of Revenue - vehicle rental taxes; (2) Department of Natural Resources - recorder's fees and special use areas for Haines and Paxson; (3) Department of Community and Economic Development - numerous occupational licensing regulations and Regulatory Commission of Alaska regulations; (4) Department of Fish and Game - permit for taking wolves using aircraft; (5) Department of Education - waiver procedures for high school qualifying examinations for diplomas; (6) Department of Environmental Conservation - drinking water requirements relating to lead and copper; (7) Department of Military and Veterans' Affairs - veterans' memorial grants; (8) State Human Rights Commission - investigations and hearings of the commission.

Juneau Department of Law Employees Donate Generously to Local Charities

During December, 2003, the Department of Law Employees in Juneau donated generously to local charities. A food drive was held for the Southeast Alaska Food Bank and 1,248.5 pounds of food were collected. Also, \$1,670 was donated to Meals on Wheels to provide nutritious hot meals to needy seniors in the community. Thanks go to Christy Blair of Special Litigation Section, and Kevin Messing of Legislation and Regulations Section for coordinating the effort and to Ethan Falatko of Human Services Section, Anne Marie Palumbo of Commercial and Fair Business Practices, and Monique Imboden, law office assistant with the Commercial and Fair

Business Practices Section, for assisting in boxing and transporting the food.

Natural Resources

Pogo Mine Project

The Fairbanks attorneys worked on the permitting and decisional documents for the Pogo Mine Project, a gold mine being developed on the Goodpaster River, about 38 miles northeast of Delta Junction and about 85 miles from Fairbanks. The mine will use a cyanide leaching process to extract the gold, approximately 5.6 million ounces of gold. This project is a high priority of the administration. Governor Murkowski had earlier personally delivered the Final EIS wrapped in gold and blue paper to the Japanese company that is part of the Teck-Pogo Joint venture. The Fairbanks attorneys assisted DNR in finalizing the decisions for this project, including the Millsite Lease, the Right-of-way for 49-mile long Pogo Mine Project Road, the Right-of-way for the power line to the mine, the Competitive Land Lease for a Maintenance/Staging Facility, the Competitive Material Sale for road construction materials, and the Plan of Operations Approval.

The decisions were issued on December 18, 2003, and represent a milestone in the lengthy permitting process for the Pogo Mine Project. Teck-Pogo was authorized to immediately begin construction and use of the Shaw Creek and Goodpaster winter trails that are being used for construction of the rights-of-way.

Board of Game Predator Control Plan

In late November and early December, AAG Kevin Saxby defended the Board of Game's predator control plan for an area near McGrath. Because of severely depleted moose populations, which are unable to recover to prior levels due to heavy wolf and bear

predation on calves, the Board had approved a program involving relocation of bears and aerial control of wolves.

The Connecticut-based Friends of Animals and several others sued to enjoin the program, arguing that the Board had failed to make necessary findings to support the decision. The court initially granted a temporary restraining order, halting the program, but then dissolved the TRO and denied the requested preliminary injunction following a full review of the controlling statutes, arguments, and evidence. The trial court found that the Friends of Animals had failed to state serious and substantial questions going to the merits of the case, and allowed the program to proceed. The temporary delay was long enough to bring Alaska into the low-light conditions around the winter solstice that make aerial control extremely difficult. No wolves were taken under the program in December

Board of Fisheries Regulatory Meeting

AAG Jon Goltz attended the Board of Fisheries' regulatory meeting for Bristol Bay finfish issues December 9 - 17. The board considered a number of proposals intended to improve the economic return from commercial salmon fisheries in Bristol Bay, as well as issues regarding commercial herring fishing, subsistence fishing, and sport fishing. The Board adopted a proposal that allows two permit holders who work together on one boat to use a longer net than is allowed for only one permit holder, which may result in reduced costs for fishermen and fewer nets in the water.

Oil, Gas, & Mining

RCA Hears Intrastate Tariff Challenge

In December, AAGs Jan Levy and Phil Reeves appeared on behalf of the State before the Regulatory Commission of Alaska. Refiners Tesoro and Williams have challenged the 2001 to 2003 TAPS intrastate tariffs. The hearing began December 3 and progressed for 3 weeks. The hearing is continued until the last week in January.

State Files Protest With FERC Over 2004 Interstate Tariff Rates

Also in December, outside counsel and AAG Jan Levy filed a protest of the TAPS Carriers' 2004 interstate rates before the Federal Energy Regulatory Commission. The State is arguing that the TAPS Carriers cannot collect from interstate shippers those costs that the Regulatory Commission of Alaska prohibited the Carriers from collecting from the intrastate shippers. The FERC appointed a settlement judge and has ordered the parties to attend a settlement conference in January.

Opinions, Appeals & Ethics

Section Assists on Appeal Decisions

The Opinions, Appeals & Ethics Section continued its role in facilitating the determinations by the Attorney General on whether to appeal from adverse decisions of the trial courts. AAG Mary Lundquist prepared an appeal recommendation memorandum in a case (Cowgill) involving the award of enhanced attorneys' fees by the Alaska Workers' Compensation Board. The theory behind enhanced fees is to allow claimants' counsel

adequate overall compensation so that they are not competitively disadvantaged to their defense counterparts (who get paid, win or lose). The State had presented evidence below demonstrating that the contingent nature of claimants' litigation has been overestimated and showing that claimants' counsel rarely do not get paid. The evidence was disregarded by the Board. A decision was made to file an appeal on this case to the Alaska Supreme Court.

Torts & Workers' Compensation

Petition for Review Filed in *Doe v. State*

The section filed a petition for review in the case of *Jane Doe v. State of Alaska, Dep't of Corrections* to clarify the current state of tort law in the context of parole supervision cases. The case stems from a sexual assault committed by a parolee who had been recently released on mandatory parole. Plaintiff contends the State is liable for negligent parole supervision under the holding of the 1986 decision, *Division of Corrections v. Neakok*.

The State moved for summary judgment based on a recent Alaska Supreme Court case, *Sandsness*, which suggests Neakok needs reexamination, and based on more recent Alaska cases that hold that the State owes no actionable legal duty to protect the public until it has notice of a "known danger." The trial court denied the motion, finding that "Neakok is the controlling law with respect to adult parolees in this state." In the Petition, the State asks the Court to re-establish the proper balance between rehabilitation and public safety in adult parole supervision by confirming that, as in other public safety contexts, the State owes no actionable duty absent notice of a "known danger." To the extent Neakok suggests a different legal

standard, the supreme court is being asked to expressly overrule it. The case is being handled by AAG Stephanie Galbraith.

Transportation

Personnel

The Transportation Section welcomes Law Office Assistant Beth Goodwin back to the section's Anchorage office. Beth moved away from Transportation several years ago. We are glad to have her back. The Section also welcomes Assistant Attorney General Jeff Stark to its Anchorage office. Jeff moves to our office from Delaney, Wiles, Hayes, Gerety & Ellis.

Standard Contract Provisions Revised

The Department of Transportation and Public Facilities finished redrafting the portion of its standard contract provisions for highway construction addressing the allocation of legal responsibilities between a contractor and the state. DOTPF has been working on the redraft of this seventy-page contract segment for several years, striving to balance the legitimate concerns of DOTPF's design, contracting, construction, and regional personnel, the contracting community, and the Department of Law. AAG Jim Cantor completed the Department of Law's final review of these contract provisions, although many other assistant attorneys general contributed over the years to this redraft.

Condemnation Cases Resolved

The Department of Transportation and Public Facilities settled a pending condemnation needed to construct C Street from Diamond Boulevard to O'Malley Road in Anchorage.

AAG Peter Putzier helped DOTPF resolve the landowners' concerns about access to their

parcel. AAG Putzier filed three additional condemnations to allow this important roadway project to proceed.

Criminal Division

Anchorage

The Anchorage office presented 47 cases to the grand jury during December, and tried seven cases during the month.

There were two homicides in Anchorage during December, but charges have been filed in only one of the cases. A man was shot to death when he found himself between his brother and another man, who were involved in a drug deal. No one has been charged in the killing to date. In another case, a woman was shot to death by a neighbor with whom she had argued in the past, and who has now been charged with her murder.

The grand jury indicted four people, for attempted murder and robbery arising out of a home invasion robbery. The three men went into the house, while the woman waited outside as the getaway driver. When the homeowner fled out the back door, one of the robbers shot him in the back.

The grand jury indicted a man for vehicle theft, felony assault, and eluding a police officer. The vehicle owner tried to stop the theft of his car by hanging to his van, as it sped away. The owner spotted a police vehicle and attracted the attention of the officer by throwing a chisel he was carrying at the police car. Once alerted by the chisel striking his patrol vehicle, the officer tried to stop the van, but the defendant kept going, trying to throw the owner off and running red lights and driving on the sidewalk to elude the police.

The grand jury indicted a man for sexual assault in the first degree. He had given the

woman a place to stay in Anchorage, but when they got out of a cab, he pushed her into a wooded area and raped her. The Crime Lab identified him as the attacker by a DNA hit in CODIS, the Combined DNA Index System.

Assistant District Attorney John Skidmore tried Craig Brown and convicted him of burglary based on DNA evidence alone. In the middle of the night, Brown broke in the glass door of a business and stole a computer. He left drops of blood on the floor near the broken glass, and the only evidence that Brown was the burglar was a DNA match of Brown's blood to the two drops on the floor.

Assistant District Attorney John Novak won a tough trial, convicting Michael Bailey of murder in the second degree in the 1999 beating death of his wife. Bailey had a history of domestic violence toward his wife, established by the testimony of their children and the parents of the wife. In June 1999, he had repeatedly slammed her head into the walls of their home, killing her. He then dumped her body in Kincaid Park and tried to make it look like a rape scene, rather than the domestic murder that it was. He had made inconsistent explanations for his last contact with his wife, but the case was, for the most part, a circumstantial one.

Special thanks go to Assistant District Attorney Mike Burke, who traveled to Kenai to help an understaffed Kenai District Attorney's Office, and won three misdemeanor jury trials in one week.

Bethel

In jury trials, a woman was found guilty of driving under the influence and refusal, but not guilty of resisting arrest; a man was found not guilty of assault in the second degree and assault in the third degree; and a woman was found not guilty of driving under the influence after a jury trial in Aniak.

The grand jury action was all over the board. There were separate indictments for sexual abuse of a minor, two cases of sexual assault, attempted murder, manslaughter, felony importation of alcohol, felony drugs, two cases of selling liquor without a license, two cases of possession of alcohol with intent to sell, manufacturing alcohol, three cases of felony assault, three cases of burglary, felony driving under the influence, and felony theft.

The Bethel court is making changes on the way it utilizes jurors and grand jurors. Beginning in January, both petit jurors and grand jurors will serve for only 30 days. The impact on petit juries is minimal, if there are enough jurors to maintain the pool. The impact on grand juries will be greater as this will require 12 grand juries to be sworn in per year as opposed to the previous three per year. We will have to see what the impact is on presenting cases to grand jury. It may require us to more frequently add a second day to the grand juries weekly service. The Bethel court is also instituting video arraignments and will no longer transport in-custody inmates to the Bethel court for telephonic appearances with the village courts.

Fairbanks

Two Fort Wainwright soldiers were convicted of lesser-included offenses of misdemeanor assault after a trial for the beating of another man outside a local strip club.

A Fairbanks man pled no contest and was sentenced to 15 years for the rape of a 17-year-old girl last March.

The Alaska Court of Appeals rejected the appeals of Richard Cook and James Thunderhawk – father and son who both had previous convictions for sexual crimes. Cook is presently serving a 15-year term for the molesting his adopted daughter while he was serving as a pastor in Ruby. Thunderhawk is serving a 19-year sentence for sexual assault

and assault in raping a teenage girl at knifepoint in Fairbanks.

A Fairbanks man, charged with having sex with a 13-year-old girl after meeting her through the Internet, will serve up to 18 months in jail after reaching a plea agreement. This is the second case recently in which a Fairbanks-area girl was found to be the victim of sexual abuse after meeting a man through the Internet.

A man has been charged with the first-degree murder of a local man whose body was recently found in the truck of a burned, abandoned vehicle. And the Fairbanks Grand Jury indicted 32 individuals in December on a variety of felony charges.

Juneau

In December the Alaska Court of Appeals reversal of a murder conviction that had been tried by the Juneau Office in 2002. In *Smith v. State*, Opinion No. 1909, December 13, 2003, the court of appeals concluded that a declaration against penal interest by a third party implicating the defendant was admitted in violation of his constitutional right to confront and cross-examine and was not harmless error. A petition for hearing with the Alaska Supreme Court is being pursued.

Kenai

During the first week of December, there were five trials in four days in District Court in Kenai, with an almost clean sweep for the State. Anchorage ADA Mike Burke got three convictions in a row. And new ADA Jake Ketscher hit the ground running and did two trials his first week in the office. If all of that didn't wear down the opposition, during the second week there were more misdemeanor trials and a conviction on a multiple-count/multiple-victim sexual abuse of a minor case.

In Homer, a defendant charged with assault in the fourth degree raised the ante when he exploded in court and assaulted the officers who came to take him into custody. Five stitches, much blood, and a drawn Taser later, the situation was under control. Moreover, it was all on the record, as was the grand jury indictment for assault in the third degree.

Our Christmas day the office was saddened with the death of Kenai Police Officer John Watson in the line of duty. The Kenai grand jury returned an indictment charging first degree murder, as well as four counts of assault in the third degree for assaults on the two officers who first arrived on scene and the defendant's fiancée who was a witness to the escalating events of the day. The defendant sits in jail under a million-dollar bail.

Ketchikan

This was the month for stupid property crimes in Ketchikan. In one case, a man on felony probation for two prior felony thefts obviously liked getting his picture taken. He was indicted for felony theft, eight counts of forgery, and fraudulent use of credit card after he stole checks from the house where his girlfriend was house-sitting. He then got his friends to cash eight of them. The ninth forged check was cashed at the local Wal-Mart, which video-taped the man coming getting \$900 worth of items bought with the forged checks. He also used the victim's credit card to get money from an ATM machine, which photographed him. More mugshots are likely to follow.

In another case, a man broke into two hotel rooms within a couple hours and was caught in both of them by the occupants. He ran from both rooms, but was later caught and charged with burglary and theft. In another two-for-one case, a man working for a local hotel stole over \$3,000.00 in money and checks from the hotel safe, and was fired. He was then hired by another local hotel and was caught

attempting to steal money from their safe. He then confessed to both his misdeeds and has been indicted for theft and attempted theft.

A Prince of Wales man was indicted for sexual abuse of minor in the second degree. Several defendants were indicted for misconduct involving controlled substance in the fourth degree.

A Ketchikan man was indicted for felony driving while intoxicated. Another man cashed five forged checks and was indicted for five counts of forgery in the second degree and one count of theft in the second degree. A woman was indicted for burglary and related crimes for breaking into her estranged boyfriend's house and assaulting him.

Kodiak

A Kodiak man was sentenced to 15 years in prison, with 6 suspended, for sexual assault of a minor in the first degree. Following his release from incarceration he will be on probation for 10 years, and will be required to register as a sexual offender for life.

Following up a tip from Anchorage narcotics detectives, an Anchorage man was intercepted on an incoming flight at the Kodiak airport. When he declined to allow local police to search his hand-carried bag, they obtained a search warrant and found over a pound of cocaine with a street value in excess of \$60,000. The Kodiak grand jury subsequently indicted him for misconduct involving a controlled substance in the third degree. A March trial date is pending.

A Kodiak woman, employed by a local air service made a false airline employee identification card for her son, whom she knew to have felony charges pending in another state. Her son subsequently fled the other state under the fictitious name his mother had placed on the identification card. A bail bondsmen there tipped off local

authorities that they believed he would be returning to Kodiak, and he was spotted by an off-duty Kodiak detective who personally knew the man. The man tendered the false identification card and claimed to be the fictitious person, and was quite adamant in continuing this charade until jail officers discovered a tattoo on his back. The tattoo? — his real name. While her son was awaiting extradition back to the other state, the Kodiak grand jury indicted the mother for hindering prosecution in the first degree.

Kotzebue

A Kotzebue man was arrested for assault in the first degree and weapons misconduct in the second degree. The Kotzebue police also arrested a man for assault in the fourth degree for kicking his girlfriend in the stomach. After his arrest, the police learned that he had an outstanding warrant out of Missouri for parole and probation violations and was thus charged with being a fugitive from justice. A defendant ran from the courthouse after being remanded to custody, and was found shortly thereafter in a local residence hiding under a mattress. He was then arrested and charged with the additional offense of escape in the second degree, and thus is likely to have to learn to appreciate prison mattresses.

Nome

A White Mountain man was indicted for assault in the second degree and kidnapping after a domestic assault in the village. The man assaulted and strangled his girlfriend and tied a rope around her with the other end looped around his own neck. His objective was apparently to be awakened if he passed out and the victim attempted to leave the residence to report the assault. The victim was rescued by her adult son. Also indicted was physician's assistant in a case briefly reported last month, in which he distributed morphine and Demerol to a friend who

"wanted it" without benefit of a prescription or medical need. The Nome court continued to receive substantial statewide publicity surrounding Judge Esch's decision to reduce bail and allow electronic monitoring of former Nome police officer Matthew Owens, charged with murder.

Palmer

A man was indicted for felony assault for shooting another man who was walking away from the intoxicated defendant's house. The victim was hit in the buttock, with the bullet traveling through his body and striking his hand, requiring extensive medical treatment.

A man was indicted after confessing to multiple counts of sexual abuse of a minor for against a 14-year-old relative, for whom he was legal guardian.

A man was indicted on four counts of sexual assault in the first degree, based on two separate allegations that he sexually assaulted women in the Palmer-Wasilla area during the summer of 2003. The man's DNA was present in evidence collected from both victims. The investigation involved officers from the State Troopers, Alaska Bureau of Investigation (Palmer), Anchorage Police Department, Palmer Police Department and the Crime Lab.

Charles Slack pled no contest to one count of sexual abuse of a minor in the second degree for having a sexual relationship with his 15-year-old cousin. The victim, who became pregnant, intended to marry him, but her best friend reported it to the police. Martha Mizell, the victim's mother, pled to hindering prosecution for helping Slack in his attempt to leave the state.

Two men were indicted on charges of misconduct involving weapons in the first degree and assault in the third degree. The victim was driving his friend, who was injured in an ATV accident, to Elmendorf Hospital. One

of the defendants prevented the victim from passing him on the highway by slowing down and swerving in his direction. After the victim finally passed, both defendants shot at the victim's truck. One bullet struck the driver's side mirror. Upon being stopped by state troopers, the defendants admitted shooting the gun out of the moving vehicle. The driver was also charged with driving under the influence and both were charged with possessing a firearm while impaired.

Three defendants, armed with shotguns, were indicted on burglary charges, after a security video system in the Houston home caught the suspects on film.

John Burk was sentenced to serve seven years in prison on burglary, assault and vehicle theft charges and ordered to pay over \$30,000 in restitution. Burk burglarized a number of homes in 2003 and shot a handgun at a victim, who was home when he and two accomplices kicked her door open and entered her residence.

The Palmer grand jury indicted a man on charges of assault in the first degree and assault in the third degree for driving his car at high speeds and into a school bus. His passenger sustained serious injuries and two school children were treated for minor injuries. Lab tests revealed he had barbiturates, opiates and THC in his system.

OSPA

Petitions of Interest

Minor consuming; equal protection. District Court Judge and ex-prosecutor Jack Smith ruled in two separate cases that the mandatory probation requirement for first offenders convicted of minor consuming alcohol violates equal protection because the

statute requires younger offenders to remain on mandatory probation longer than older offenders. The state successfully moved to consolidate its appeal of these rulings with an ongoing appeal of an identical decision by Judge Murphy. In that appeal, the state is arguing that it has a compelling interest in curbing underage drinking and a substantial relationship exists between this interest and placing an offending minor on mandatory probation until age 21. If you have a minor consuming alcohol case in which a magistrate or judge rules that the statute violates equal protection, please contact Nancy Simel at the Office of Special Prosecutions and Appeals immediately. *State v. Komakhuk*, A-8725; *State v. Peterson*, A-8726.

Briefs of Interest

Objective standard for investigatory stops. The state argues that the court of appeals should explicitly adopt, as a matter of state constitutional law, the objective standard from *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769 (1996), for evaluating investigatory stops. The *Whren* test asks whether a hypothetical officer armed with the knowledge possessed by the actual officer would have reasonable suspicion to make the stop. The defendant claimed below and on appeal that the officer who stopped him did so as a pretext to get him for a past incident. The defendant unsuccessfully asked the trial court to adopt a subjective standard that focused on the officer's personal motivation for making the stop. *Nease v. State*, A-8560.

Barring attack on prior DWI convictions. The defendant was convicted of driving while intoxicated. He had six prior driving while intoxicated convictions, which aggravated the minimum term he would be required to serve for his new offense. The state argues that a magistrate correctly applied *Brockway v. State*, 37 P.2d 427 (Alaska App. 2001), to preclude the defendant at sentencing from bringing an untimely attack on the constitutionality of the

prior driving while intoxicated convictions. The state asserts that the only exceptions to the *Brockway* rule are where the defendant claims his prior conviction was entered in violation of his fundamental constitutional rights to counsel or jury trial. Because the particular defendant was not claiming either of these constitutional violations, the *Brockway* rule barring the attacks applies. *Brodigan v. State*, A-8597.

declarant – a gun that the defendant shortly thereafter used to murder someone. The Office of Special Prosecutions and Appeals has filed a petition for hearing with the Alaska Supreme Court over this ruling. *Smith v. State*, Op. No. 1909 (Alaska App., December 12, 2003).

Effective assistance; requests for lesser-included instructions. The state argues that the decision whether to request jury instructions on lesser-included offenses is the province of defense counsel, not the defendant. The state notes that the 1993 revision to the American Bar Association's Criminal Justice Standards removed language from the commentary suggesting that the decision was the defendant's, and that subsequent case law nationally has favored the state's position. The state then argues that the defendant's trial counsel was not ineffective for failing to request an instruction on a lesser-included offense when it would have conflicted with her trial strategy. *Simeon v. State*, A-8378.

Statute and Rule Interpretations

Criminal Rule 5(e)(4): preliminary examinations. The court of appeals interpreted Criminal Rule 5(e)(4) as requiring a preliminary examination, to be held at the time scheduled within the 10-day limit of the rule. It also held the fact that a case that is being presented to the grand jury at the time of the preliminary exam does not excuse the state from presenting evidence at the hearing. *Sproates v. State*, Op. No. 1908 (Alaska App., December 12, 2003).

Evidence Rule 804(b)(3): declarations against interest. The court of appeals interpreted this hearsay exception in a narrow manner to preclude the admission of a declarant's hearsay statement identifying the defendant as the person who had borrowed a gun from the